

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 94-0720
Withholding Tax
For The Tax Periods: 1990**

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ISSUES

I. **Withholding Tax – Distributive Shares**

Authority: IC 6-3-4-12, IC 6-3-2-2, IC 6-3-1-20, 45 IAC 3.1-1-106, 26 U.S.C.A. §1231.

The Taxpayer protests the assessment of withholding tax on capital gains from the sale of out of state property.

STATEMENT OF FACTS

The Taxpayer is a limited partnership consisting of non-resident partners, formed to acquire, hold, operate, lease, manage, encumber, and otherwise deal with the rental of real property. The Taxpayer owned and operated rental property within Indiana. The assessment resulted from the ownership, operation and sale of rental property located outside of Indiana. The partnership has since liquidated. More facts will be provided as necessary.

I. **Withholding Tax: Distributive Shares**

DISCUSSION

Pursuant to IC 6-3-4-12:

- (a) Every partnership shall, at the time that the partnership pays or credits amounts to any of its nonresident partners on account of their distributive

shares or partnership income, for a taxable year of the partnership, deduct and retain therefrom the amount prescribed in the withholding instructions referred to in section 8 of this chapter.

Also, according to 45 IAC 3.1-1-106, a non-resident partner must report “that part of his share of income which is derived from sources within Indiana as determined by use of the apportionment formula described in IC 6-3-2-2(b).” Therefore, in accordance with IC 6-3-2-2(b):

if business income of a corporation or a nonresident person is derived from sources within the state of Indiana and from sources without the state of Indiana, then the business income derived from sources within this state shall be determined by multiplying the business income derived from sources both within and without the state of Indiana...

The Taxpayer contends that business income does not include capital gains from the disposition of real property. They state that the gain does not constitute an integral part of the taxpayer’s regular operations, but rather, constitutes non-business income. The Taxpayer goes on to state that since the amount in question is non-business income, it is not subject to apportionment, but rather, subject to specific allocation. However, pursuant to IC 6-3-1-20:

The term “business Income” means income arising from transactions and activity in the regular course of the taxpayer’s trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitutes integral parts of the taxpayer’s regular trade or business operations.

Thus, the Taxpayer is incorrect. IC 6-3-1-20 clearly includes the disposition of property in its definition. Since the corporation was formed to acquire, hold, and operate rental property, the acquisition and disposition of the property constitutes an integral part of the Taxpayer’s business. This is also consistent with 26 U.S.C.A §1231(a)(3), which defines a capital gain as “any recognized gain on the sale or exchange of property used in the trade or business.” Therefore, the gain in question should have been included in the apportionment formula.

FINDING

The Taxpayer’s protest is respectfully denied.